REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.97 OF 2019

PETER NG'ANG'A NDUTA…… APPLICANT

VERSUS

REPUBLIC……RESPONDENT

RULING

The Applicant, Peter Ng'ang'a Nduta was convicted of two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was also convicted of one count of **rape** contrary to the then **Section 140** of the **Penal Code**. He was finally convicted of the charge of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The Applicant was convicted on his own plea of guilt on all the charges. He was sentenced to death. His appeal to the High Court was dismissed. His further appeal to the Court of Appeal was also dismissed. Needless to say, the conviction and sentence of the Applicant was confirmed by both the High Court and the Court of Appeal. That would have been the end of the matter but for the window opened by the Supreme Court's decision of **Francis Karioko Muruatetu - vs- Republic [2017] eKLR**. The court in this case declared mandatory death sentences unconstitutional. It further directed the High Court to rehear the mitigation of those who were so convicted with a view to appropriately resentencing them.

In his application before court, the Applicant told the court that he had been in lawful custody for the past seventeen (17) years. He attributed his criminal conduct to the influence of drugs and bad company. During his stay in prison, he had learnt his lesson and had become a better person. He had grown spiritually and had become a crusader against drug abuse. He urged the court to take into consideration that his health had deteriorated in the period that he has been in prison. He enclosed a copy of a medical report by the prison's clinical officer who indicated that the Applicant had suffered a mild stroke during his incarceration. He was also asthmatic and relied on constant medication to keep the worst symptoms away. He urged the court to give him a second chance at life. Ms. Kimaru for the State noted that the Applicant had been convicted on his own plea of guilt. He had been in prison for eighteen (18) years. She was not opposed to the court meting out an appropriate sentence to the Applicant.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

> ***"[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
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> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant.***

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

> ***"25. GUIDELINE JUDGMENTS***
>
> ***25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.""***

In the present application, it was clear to this court that indeed in the period of approximately eighteen (18) years that the Applicant was in lawful custody, he had learnt his lesson. He is remorseful. During the period of his incarceration, his health has taken a turn for the worse since he had a stroke. This court notes that there is no adverse report from the prison authorities. Obviously, the Applicant has been reformed in the period that he has been in prison. The State did not have serious objection for this court to favourably exercise its re-sentencing discretion.

In the circumstances therefore, this court holds that the period that the Applicant has been in prison is sufficient punishment. The court was also persuaded by the fact that the Applicant pled guilty to the charges thus saving the court's time. In the premises therefore, the custodial sentence of the Applicant is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2019

L. KIMARU

JUDGE